No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, A MUNICIPAL CORPORATION,
PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE.
RESPONDENTS.

BRIEF OF RESPONDENTS, THE TAXPAYERS OF TACOMA, WASHINGTON

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INDEX

INDEX

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EXPLANATORY NOTE

Respondent Taxpayers by this brief will attempt to answer the briefs of both petitioner, City of Tacoma, and amicus curiae, Federal Power Commission. They will, respectively, be referred to herein as petitioner and amicus curiae.

QUESTIONS PRESENTED

Respondents do not agree with the statement of questions presented in brief of petitioner but feel that amicus curiae have substantially presented the question, but that it is probably better phrased by quoting the language of the Washington Supreme Court:

> "Does a municipal corporation, created by the state as a subordinate unit, have the power

to condemn state lands held in a governmental capacity and previously dedicated to (fol. 451) a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?" (R. 277).

STATUTES INVOLVED

In addition to statutes cited by petitioner and amicus curiae the following statutes and charter provisions are cited by respondents, and are set forth in the Appendix, *infra* pages 30-34.

41 Stat. 1071, 16 U.S.C. 906;

41 Stat. 1074, 16 U.S.C. 814;

Laws of Washington, 1949, Chapter 9; R.C.W. 75.20.010;

R.C.W. 54.16.050;

Charter of City of Tacoma:

Article I, Section 1.2

Article IV, Section 4.1

STATEMENT OF CASE

Respondents adopt the statement of the case as set forth by amicus curiae, with the additional statement: The State of Washington had a fish hatchery located on the Cowlitz River at the site in question for a number of years prior to any proceedings by the petitioner seeking a license from the Federal Power Commission. Primary application for a license was made by the City of Tacoma on August 6, 1948, when the City filed a declaration of intent under the provisions of the Federal Power Act to construct a water power project on the Cowlitz River. The succeeding session of the Washington state legislature, which convened in Jan-

uary, 1949, as one of its first actions adopted an act known as Chapter 9, Session Laws of 1949, *infra*, p. 31, creating a Columbia River fish sanctuary, in effect limiting construction of any dam in excess of 25 feet in height on the Cowlitz River. This act passed the Washington state legislature on February 9, 1949, and was approved by the Governor on February 14, 1949, and became effective on April 1, 1949. This act was the main statute in controversy in the first Taxpayers case (*Tacoma* v. *Taxpayers of Tacoma, et al.* 43 Wn. 2d. 468) (Appendix B of Petition for Writ of Certiorari, 49a) and in the case of *State of Washington, Department of Game* v *Federal Power Commission*, 207 F. 2d. 391 (Appendix D of Petition for Write of Certiorari, page 112a). In both cases the appellate court held that the act was inoperative in view of the decision of this court in *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152. Subsequent to the decisions in those cases the City of Tacoma filed an amended complaint (R. 144), and the Taxpayers and State of Washington each filed answers and affirmative defenses to the amended complaint of the City of Tacoma (Taxpayers, R.217; State of Washington, R.191), answering the amended complaint and denying certain allegations, and setting up for the first time the affirmative defense that the City did not have the authority to condemn the hatchery belonging to the State of Washington.

Charter provisions of the City of Tacoma which are pertinent to the authority of the City to construct the project are shown in Appendix A, page 33-34.

SUMMARY OF ARGUMENT

I

THE MATTER IS MOOT

This case is moot or at least will be in a short period of time as it will be impossible for the licensee to construct the project inside the time of its licenses. The license calls for the construction of two dams: Mayfield and Mossyrock. The licensee was given until December 31, 1955, to commence construction of the project and it did commence construction of the Mayfield dam prior to that date but has never commenced construction of the Mossyrock dam, which was a specified part of the project works. Under the provisions of 16 U.S.C. Section 806, *infra*, page 30, the project must be commenced within the period set by the Federal Power Commission and completed within the period set by the Commission. The final completion date is June 23, 1958; it is impossible to complete the project by that date.

II

THE CASE DOES NOT PRESENT AN ADEQUATE FEDERAL QUESTION

Historically, the Federal government has been supreme in its field and the states supreme in their field. Municipal corporations are civil departments of the state and it has always been the Federal policy that the states are supreme and the the final authority on the rights and powers of their municipal subdivisions. Even if the Supreme Court of the state of Washington were incorrect in its analysis of the Federal Power Act it still is correct in its construction of the powers and

capacity of its municipal subdivisions. The history of the Federal Power Act indicates that it was not the intention of Congress to interefere with the state's control over its officers and agents, and statements made by members of the committee in charge of legislation indicate that it was the desire of Congress not to infringe any rights of the states, but to attempt to get an act under which both Federal and State governments could operate. If Section 21 of the Federal Power Act is interpreted as suggested by petitioner and amicus curiae it will result in local subdivisions of government destroying their creator. Such was never the intention of Congress—it is not expressly granted in the Federal Power Act nor can it be reasonably inferred therefrom.

III

EMINENT DOMAIN

Section 21 of the Federal Power Act, *infra*, page 31, appears to be a venue statute. It authorizes licensees of the act to sue in the Federal courts. The general rule on eminent domain proceedings is that they shall be brought in the court of the county in which the land is situated. The act does not state that it is a grant of Federal power of eminent domain but simply states that licensees may acquire property "by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land or other property may be located, or in the state courts." This court has never construed this statute and in most of the cases which have mentioned the Act the question of eminent domain has not been mentioned.

In one case, *State of Missouri ex rel. Camden County* v. *Union Elec. Light & Power Co.*, 42 Fed. (2d) 692, the court did determine that it was a grant of eminent domain. This case stands alone for this proposition. Since all persons that might apply for a licenses would normally have the power of eminent domain in the absence of a Federal grant, the statute makes the most sense, when it is construed as a grant of the right to exercise that power of eminent domain which the licensee already has, in the Federal court, and make that a court of venue as well as the state court.

IV

CASES CITED BY PETITIONER AND AMICUS CURIAE

Most of the cases cited by petitioner and amicus curiae are not pertinent to the issues in this case. They have cited numerous cases involving taking by the United States of America. That is not the question here, and no one claims that the United States cannot take property for its own use. They have cited other cases where Congress, by special act, has authorized various persons, corporations, states or municipal corporations, to exercise certain powers, including in some cases the power of eminent domain over and above the powers which they would normally have. In these cases it can be assumed that Congress determined that the Federal grant was necessary for them to accomplish the purpose for which the law had been passed. There is no special act of Congress involved in this proceeding, and in light of the Congressional history it would appear that the act was never intended to

interefere with the rights of the states in their own domain. Counsel have also cited numerous cases involving taking of private property. These cases are not pertinent as this case involves the taking of public property previously dedicated to a public use. Cases involving the taking of public property held in a proprietary capacity are not pertinent as they involve an entirely different question and type of ownership.

V

DECISION IN THE NINTH CIRCUIT COURT OF APPEALS

Petitioner claims that the decision in the Ninth Circuit Court *(State of Washington, Department of Game* v. *Federal Power Commission*, 207 Fed. (2) 391) is *res judicata.* As was pointed out in that case by the court, the question of the capacity of the city to act under the license once it had been received, was expressly withdrawn from consideration. The relationship between state and municipal corporation is a state question, and nowhere in the Federal Power Act is there any statement, or even inference, that the Federal Power Commission is authorized to determine questions of local law. As a matter of fact the Court of Appeals stated that the Federal Power Commission had no power to adjudicate such questions, and if the Commission had no power to adjudicate such a question the matter cannot be *res judicata.*

VI

PREFERENCE CLAUSE

Amicus curiae feels that the decision thwarts the preference clause of the Federal Power Act. The records show that the state of Washington has been

operating a fish hatchery, a governmental operation, on the Cowlitz River for many years and was doing so prior to any proceedings in the instant case. Washington cities do not have the capacity to acquire state property dedicated to a public use by eminent domain. The state legislature has, however, authorized Public Utility Districts to acquire state property, and if the license had been granted to an authorized public agency that public agency could have constructed the project under the Federal license. The state may specify which of its municipal subdivisions may take its property and inclusion of one does not imply inclusion of all. Rather than thwarting the Federal Power Act the case is actually an instance of the city thwarting the state.

ARGUMENT

THE MATTER IS MOOT

41 Stat 1071, Title 16, U.S.C., Section 806 provides as follows:

> The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement

> of construction may be extended once but not alnger than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as proivded for in section 820 of this title."

The order granting the license to the City of Tacoma is shown beginning on page 27 of the Record and it may be noted that the project works for which the license was granted specified the construction of two dams—Mayfield and Mossyrock. (R 28 (2)) Pursuant to the terms of Section B, Article 28 of the order (R.45), the licensee was required to commence construction of the project within two years from January 1, 1952, and complete the project works within thirty-six months. This date was subsequently extended by order of the Commission on February 26, 1954, (R.159-160). This order provides for commencement

of the project by December 31, 1955. No reference being made to the completion date it is assumed that the completion date is an additional thirty-six months as was provided in Article 28 of the original order granting the license. The City of Tacoma entered into construction of the Mayfield dam on June 23, 1955, as was determined by the Superior Court in its findings (R.253), but the city has started no construction on the Mossyrock dam, which is a specified part of the project, and it is a certainty that the project can never be completed before June 23, 1958. Counsel realize that the city has been sorely troubled by litigation during this period but the words of the statute are clear that one and only one extension for commencement of the construction may be granted and that extension for a period of time not longer than an additional two years. Unfortunate as the situation may be, it seems to counsel that the whole matter is moot. Construction of the project in accordance with the license and the law cannot possibly be completed. Nor for that matter has it been started on the Mossyrock portion of the project, which the record shows is the major dam.

This court does not grant advisory opinions or opinion in matters that are or may be moot.[1] It is submitted that the records show this to be the present condition of this case.

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[1] *United States* v *Alaska Steamship Co.* 253 U. S. 113, 116; *Doremus* v. *Board of Education*, 342 U. S. 429, 432; *Brownlow* v. *Schwartz*, 261 U. S. 216, 217.

LIMITING THE QUESTION

Certain fundamental rules of law can be accepted to narrow the ultimate question of the present case. First, respondents admit that the United States, for its national purposes, has the right to acquire for itself by right of eminent domain property within the several states. *Kohl* v. *United States*, 91 U. S. 367, Second, where the Federal government has entered into a field within its constitutional power its rights are exclusive to any rights which the states may have in that field, and any law or constitutional provision of the states contrary to the Federal provision are inoperative and can be of no effect against the superior Federal law. *First Iowa Hydro-Electric Coop*, v. *Federal Power Commission*, 328 U.S. 152. On the basis of this decision the Washington Supreme Court, in the case of *City of Tacoma* v. *Taxpayers of Tacoma, et al*, 43 Wn. 2d. 468, held that the Washington State Sanctuary Act and other similar statutes, were inoperative since they placed additional limitation on the licensee of the Federal Power Commission over and above the limitation placed by the Federal Power Commission. To the same effect was the decision of the Court of Appeals in the case *State of Washington, Department of Game, et al.* v. *Federal Power Commission*, 207 F. 2d. 291, and the instant case, *City of Tacoma* v. *Taxpayers of Tacoma, et al.* 49 Wn. 2d. 781, 800-801. Third, the various sovereign states of the Union in the creation and authorization of various municipal subdivisions thereof, have the sole power to determine under what terms they shall come into existence and

what powers and duties they shall perform during their existence, and such municipal corporations have only such powers as have been granted by the state. In *Trenton* v. *New Jersey*, 262 U. S. 182, 187, the court stated:

> "In all these respects, the state is supreme; and its legislative body, confirming its action to the state Constitution may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.
>
> * * *
>
> "A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will."

NO FEDERAL QUESTION NECESSARY FOR DETERMINATION

Coming to the instant case, the Supreme Court of Washington has determined the power and capacity of the City of Tacoma to operate under a Federal Power license. The specific point in question was stated by the Washington court (R.277):

> "Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to (fol.451) a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?"

The court in that case stated in no uncertain terms (R.284):

> "We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute."

Then, aft · discussing the question of whether or not the petitioner had the power to condemn state-owned lands previously dedicated to a public use the court in answer to the proposition that the decision of the Court of Appeals was *res judicata* stated (R.285):

> "Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*" (Emphasis by the court)

After discussing the First Iowa case (328 U. S. 152) and the first Taxpayers case (43 Wn. (2d). 468), the court concluded (R.286):

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington." (Emphasis by the court)

This court, in a long line of cases, has adhered to the principle that the determination by the highest court of the state of the rights of that state and its municipal subdivisions to each other is final and bind-

ing on all other courts.[2] A typical case on this point is that of *Claiborne County* v. *Brooks*, 111 U. S. 400, 410 where the court stated:

> "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organization shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

While it is true that the state can pass no act or regulation inconsistent with the Federal regulation this does not mean that the Federal Power Act can be considered to have changed the rules of relationship between sovereign state and municipal subdivisions. Nowhere in the Federal Act is there any indication of this purpose, and if one is to be claimed it must be on the implied purpose of the act.

As was stated by this court in the case of *Parker* v. *Brown*, 317 U. S. 341, 351, where the appellee claimed that the Federal government (by the adoption of the Sherman act and the Agricultural Marketing Agreement Act, (7 U.S.C. Sec. 601, et seq.)), had pre-empted the field in which the state of California was attempting to regulate:

> "In a dual system of government in which under the constitution the states are sovereign, save only as Congress may constitutionally sub-

[2] *R. R. Commission of Calif.* v *Los Angeles Ry. Corp.* 280 U. S. 145, 152. *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 613. *Richmond* v. *Smith*, 15 Wall. 429, 438. *Trenton* v. *New Jersey*, 262 U. S. 182.

> tract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

If it can be said that Congress intended one way or the other to effect state control by the adoption of the Power Act then it must be held to be the Congressional policy *not* to nullify that control, for in the Congressional discussion of the Water Power bill, Representative William L. LaFollette, of Washington, a member of the House Special Committee on Water Power, stated:

> "This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it." 56 Cong. Rec. 9110.
>
> "We are earnestly trying not to infringe the rights of the States." 56 Cong. Rec. 9810.

Quoted in *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 253.

The decision of the Washington court on the powers of its municipal subdivision is a final determination on all courts.[3]

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[3] The laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States. 62 Stat. 944, 28 U.S.C. 1652. See also *Erie R. Co* v. *Tompkins*, 304 U. S. 64, 78.

SECTION 21 OF THE FEDERAL POWER ACT APPEARS TO BE A VENUE STATUTE RATHER THAN ONE OF GRANT OF EMINENT DOMAIN

Petitioner and amicus curiae assume that Section 21 of the Federal Power Act (41 Stat. 1074, 16 U.S.C. 814) is a grant of eminent domain by Congress to the licensee. At page 20 of their brief amicus curiae quote a statement of Congressman Eugene Black (58 Cong. Rec. 1932). Congressman Black was not one of the members of the committee in charge of this bill and this court has stated that discussions of a bill on the floor of Congress by persons not in charge of the bill "are without weight in the interpretation of a statute." *McCaughn et al.* v. *Hershey Choc. Co.*, 283 U. S. 488, 494. The statute, rather than being a grant of power of eminent domain, appears to be a statute of venue. What was granted by this statute was the right of the licensee to exercise eminent domain in the Federal as well as the state court, subject, of course, that the amount claimed exceed $3,000.00. Generally speaking, a person or corporation, either private or municipal, in the exercise of the rights of eminent domain, must exercise those rights "in the appropriate court of the county in which the land affected by the taking lies . . ." Nichols on Eminent Domain, 3rd Edition, Section 24.7 (volume 6, page 75). Under this venue statute, (Section 21), public utility corporations and municipal corporations have gone into the United States District Courts to acquire property by eminent domain where there is no diversity of citizenship and where such taking could not be had except for this particular section of the code. Where the United States acquires

property by eminent domain for its own use it does so under provisions of 62 Stat. 937, Title 28, U.S.C. section 1403, which is also a venue statute.

> "Proceedings to condemn land for public use under the right of eminent domain, . . . are local in their nature and are to be brought in the county where the land is situated, in the absence of anything to the contrary in the controlling statutes. This rule in its practical operation conforms to the principle that the judgment of a court should not operate directly on a res outside of its jurisdiction. It also permits the purchase of realty without consultation of records of the courts of other counties. It therefore commends itself to the common sense of legislatures and is generally embodied in enactments regulating venue."
> *56 Am. Jur., page 12, Venue, section 9.*

To adopt petitioner's construction that the statute is a grant of Federal power of eminent domain rather than Federal right of venue would make the act, insofar as states' property is concerned at least, inoperative under the Eleventh Amendment to the Constitution. That amendment refers only to citizens of other states or foreign states, but this court, in the case of *Fitts* v. *McGhee*, 172 U. S. 516, 524, determined that a state may not be sued by its own citizens in the Federal District Court. Under the Eleventh Amendment it could not be sued by a non-resident.

The grant of venue in the District Court makes sense. Congress must have known that many dams would be built on rivers that constituted county boundary lines, with flooding in two or more counties. Placing venue in the District Court, where the amount

in controversy exceeded $3,000.00, would substantially aid in prosecution of such projects.

If an applicant for a license did not in the first instance have power of eminent domain it is doubtful that the Federal Power Commission would grant it a license.

Counsel have cited a number of cases supporting the proposition that the Federal Power Act is a grant of eminent domain. Licensees of the Federal Power Commission have exercised the right of eminent domain in the Federal courts against private property where there is no diversity of citizenship, this taking being under the authority of Section 21 of the Federal Power Act authorizing such actions in the United States District Court in the districts in which the land is situated.[4] In none of these cases did the court determine that Section 21 of the Federal Power Act was a grant of the power of eminent domain although the court did in several of the cases consider the question of whether or not the licensee could bring the action in the Federal court. The cases are authority for the proposition that the licensee may bring an action in the Federal court to acquire property, but there is nothing in the decision of any of them that indicates that property was being taken that was held by the public and previously dedi-

[4] *Central Nebraska Public Power & Irrigation Dist.* v. *Harrison*, 127 F. (2) 588; *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 F. (2) 578; *Grand River Dam Authority* v. *Thompson*, 118 F. (2) 242; *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2) 297; *Central Nebraska Public Power and Irrigation District* v. *Fairchild*, 126 F. (2) 302; *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. (2) 84; *Wilson* v. *Union Elec. Lt. & Power Co.*, 59 F. (2) 580.

cated to a public use. Nor do the cases support the position of the petitioner or amicus curiae that there is any Federal grant of eminent domain.

CASES CITED BY PETITIONER AND AMICUS CURIAE NOT PERTINENT

Petitioner and amicus curiae reason that since the United States may condemn property for its own purposes that a licensee of the Federal Power Commission has the same authority and rights of eminent domain as the United States. They cite numerous cases supporting the proposition that the United States may delegate to private persons, municipal corporations, or states, various Federal powers, including the power of eminent domain and they, therefore, reason that the United States, through the operation of the Federal Power Act, may delegate to the petitioner powers of eminent domain which would authorize the taking of the fish hatchery. Most of the cases cited by counsel for petitioner and amicus curiae are not pertinent to the point in issue in this case, but rather decide points of general law with which counsel for respondents do not disagree. While counsel do not want to devote space to all cases cited in both briefs we will refer to typical cases cited. These cases may be broken down into various classifications as follows:

1. The United States can acquire by eminent domain property within the several states for its federal purposes, whether consented to by private citizens, municipal corporations, states or any other owners. Respondents admit that this is true, and the following cases cited by petitioner and amicus curiae, while appropriate to this point, are not determinative of the ultimate

question in the case since the United States is not for itself taking the property here in question.[5]

In each one of these cases the taking was by the United States for its own purposes. That is not the case here.

2. The United States may delegate to private persons or corporations the right to take property for purposes consistent with Federal purposes, such as interstate bridges, interstate railroads, etc., and these agents under various special acts of Congress have acquired property by eminent domain beyond their place of incorporation or legal existence under state or local law, and have exercised outside the area of their state of creation powers granted by special acts of Congress.[6]

3. Private corporations under special act of Congress have been granted the right of eminent domain against public property held by a public body in a proprietary capacity.[7]

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[5] *Oklahoma ex rel Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508; *United States* v. *Wayne County*, 252 U. S. 574; *United States* v. *Carmack*, 329 U. S. 230; *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U. S. 668; *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *South Dakota*, 212 F. (2) 14; *Minn.* v. *United States*, 125 F. (2) 636; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372; *United States* v. *Montana*, 134 F. (2) 194; *United States* v. *Wheeler Township*, 66 F. (2) 977; *C. M. Patten & Co.* v. *United States*, 61F. (2) 970; *United States* v. *.8677 Acre of Land*, 42 F. Supp. 91; *United States* v. *2715.98 Acres of Land*, 44 F. Supp. 683; *United States* v. *72 Acres of Land*, 37 F. Supp. 297; *United States* v. *60 Acres of Land*, 28 F. Supp. 368; *United States* v. *40 Acres of Land*, 24 F. Supp. 390; *United States* v. *City of Tiffin*, 190 Fed. 279.

[6] *Cherokee Nation* v. *Southern Kansas Ry. Co.* 135 U. S. 641; *Luxton* v. *North River Bridge Co.* 153 U. S. 525; *Berman* v. *Parker*, 348 U. S. 26; *California* v. *Pacific R. Co.* 127 U. S. 1.

[7] *Stockton* v. *Baltimore & N. Y. Ry. Co.* 32 Fed. 9.

4. A municipal corporation may by authority of special act of Congress exercise eminent domain against private property in another state. In these cases the state of the municipal corporation had authorized the municipal corporation to so act.[8]

5. Municipal corporations have taken land previously dedicated to a public use where authority is granted by special acts of Congress, even to the extent of public property in another state.[9]

6. The states cannot place additional restrictions or limitations on the United States, its agents or licensee inconsistent with the Federal requirement where such limitation would grant a right of nullification on the part of the state.[10]

7. Section 21 of the Federal Power Act, 16 U.S.C.A.

[8] *Latinette* v. *St. Louis*, 201 Fed. 676; *County Court, Wayne County* v. *Louisa and Fort Gay Bridge Co.*, 46 F. Supp. 1 (Right to acquire property in adjoining state denied in absence of statute of that state or Federal authority).

[9] *City of Davenport* v. 3/5 *Acre of Land*, 147 F. Supp. 794. (The court called attention to the rule that where the Federal Government condemns that the presumption is that it is for a higher and federal use but that where a delegatee of the power of eminent domain is a private party or a municipal corporation and the public use sought to be condemned would be destroyed or seriously interfered with that the exercise of the power of eminent domain will be denied unless Congress had authorized it, either expressly or by necessary implication; the court found necessary implication from the wording of the special act. The city also had authority from the state of Iowa to build a bridge across the Mississippi River.

[10] *First Iowa Hydro-Electric Coop* v. *Federal Power Commission*, 328 U. S. 152; *Seaboard Airline R. R. Co.* v. *Daniel*, 333 U. S. 118; *Texas* v. *United States*, 292 U. S. 522; *Leslie Miller Inc.* v. *United States*, 352 U. S. 187; *Public Utilities Commission of California* v. *United States No. 23 Oct. Term 1957*, 26 U. S. L. W. 4140; *Johnson* v. *Maryland*, 254 U. S. 51; *Cities Service Gas Co.* v. *Kansas*, 355 U. S. 391.

Section 814, has never been construed by this court and in only three cases has the question arisen whether a licensee under the Federal Power Act has authority to take public property previously dedicated to a public use.

One case is the instant case.

The second case is one in which the petitioner places great reliance, that of *State of Missouri ex rel. Camden County* v. *Union Electric Light & Power Company*, 42 F. (2) 692. (This case has been incorrectly referred to as State of Missouri v. Union Elec. Light & Power Company). In that case, the licensee, a private corporation public utility, was permitted to acquire by eminent domain public property previously dedicated to a public use. While it does not present the identical question of a municipal subdivision taking property of the state, it does support petitioners' premise that the Federal Power Act authorizes a licensee to take publicly dedicated property under a grant of eminent domain from the Federal Power Commission.

The third case is *Yadkin County* v. *City of High Point*, 217 North Carolina, 462. In this case the city of High Point, a licensee of the Federal Power Commission, sought to acquire a county poor farm operated by Yadkin County. The state of North Carolina intervened and joined with the county in resisting the acquisition by the licensee. The North Carolina court held that since the city had not been given express authority by the state to acquire the property it had no authority to acquire it by condemnation. Section 21 of the Federal Power Act was not discussed.

While the case of *Driscoll* v. *Burlington-Bristol Bridge Co. et al*, 8 N. J. 433, 491, does not involve the Federal Power Act it does involve conduct of a municipal corporation inconsistent with the policy of New Jersey. The Burlington County Bridge Commission claimed certain rights pursuant to special acts of Congress authorizing construction of a bridge, and the New Jersey court determined that "Quite obviously the Federal Government cannot grant a p ower to an agency of the State which the State itself has not seen fit to grant." Certiorari was denied. *344 U. S. 823*. The Burlington County Bridge Commission then instituted an action in the District Court, *Burlington County Bridge Commission* v. *Meyner*, 133 Fed. Supp. 214, and that court, passing on the matter, stated:

> "There is therefore a clear adjudication by the Supreme Court of New Jersey to the effect that the plaintiff, by virtue of its creation under the state legislation, has no power to charge tolls which include a factor of profit. It is that adjudication which defendants set up as an estoppel and which plaintiff attacks as beyond the scope of the authority of the State court.
>
> "Plaintiff advances several cases for the proposition that Congress may confer upon an instrumentality a power not specifically granted by the State for its creation. They are all distinguishable from the instant case.
>
> "In each of the cases of *Stockton* v. *Baltimore & N. Y. R. Co.*, C.C.N.J. 1887, 32 F. 9, appeal dismissed, 1891, 140 U. S. 699, 1 S. Ct. 1028, 35 L. Ed. 603; *Seaboard Air Line R. Co.* v. *Daniel*, 1948, 333 U. S. 118, 68 S. Ct. 426, 92 L. Ed. 580; *Latinette* v. *City of St. Louis*, 7 Cir. 1912, 201 F. 676; and *City of Newark* v. *Central R.*

> *Co.*, D. C. N. J. 1923, 287 F. 196, affirmed 3 Cir. 1924, 297 F. 77, affirmed 1925, 267 U. S. 377, 45 S. Ct. 328, 69 L. Ed. 666, there was involved a specific federal act granting a certain power to a defined existent instrumentality. In each of those cases it was held that the specific power could be exercised by the instrumentality concerned even though the power had not been granted by the state in its creation. Such is not the situation here. There is no specific federal action, by legislation or otherwise, granting to the Burlington County Bridge Commission the right to charge tolls which would provide for a profit on its cost in acquiring the two bridges. *Furthermore, in none of those cases was there a prior adjudication by a state court holding that the instrumentality concerned was without power to exercise the authority granted by federal action.*" (Emphasis supplied.)

See also *Arkansas Missouri Power Co.* v. *City of Kennett*, 78 F. (2) 911, 922:

> "The city derives none of its powers from the United States. It is a creature of the State of Missouri and has only such powers as the state has given it."

Amicus curiae argues that "the alleged rule of Washington law, limiting condemnation of property dedicated to prior public use, does not support the decision below". (Brief Amicus Curiae, page 44). This argument needs little answer. The Washington Supreme Court is certainly a better judge of its own decisions than any other person or group could be. It states the rule, and so far as Washington is concerned, it is the rule relative to rights between state and municipal subdivisions."

"*Wore R. Co.* v. *Tompkins*, 304 U. S. 62 Stat. 911, Section 28 U.S.C.A. 1652.

CLAIM THAT DECISION OF COURT OF APPEAL IS RES JUDICATA TO PRESENT ACTION

Petitioners claim that the decision of the Ninth Circuit Court of Appeals, *State of Washington, Dept. of Game* v. *Federal Power Commission*, 207 Fed. (2) 391, is res judicata. This claim is without merit. That case was an appeal from the order of the Federal Power Commission granting petitioner herein a license. The objection of the State Department of Game (App. to Petition for Certiorari 118a) was that:

> "1. Tacoma has not obtained from the State Supervisor of Hydraulics a permit for the diversion of water as required by Ch. 112, § 46, State of Washington Laws of 1949.
>
> "2. Tacoma has not obtained the written approval of the State Directors of Fisheries and of Game as to plans and specifications for the proper protection of fish life in connection with the construction of the dams as required by Ch. 112, § 49, State of Washington Laws of 1949.
>
> "3. Both of the proposed dams exceed the 25-foot height limit which the Washington legislature put upon the construction of dams on the Cowlitz River or on any stream of the State tributary to the Columbia River downstream from the McNary Dam and within the migratory range of anadromous fish. The Columbia River Sanctuary Act. Ch. 9, § 1, State of Washington Laws of 1949.

Counsel cite the provisions of 54 Stat. 626, 16 U.S.C. Sec. 825 l(b), in support of their position. This statute provides in part that:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing un-

> less there is reasonable ground for failure so to do. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

It is fundamental that parties participant at a hearing before an administrative agency are not required to submit to that agency for its adjudication matters beyond the scope of the authority of that agency to determine. It is also fundamental that the relationship between the State and its municipal subdivisions is a matter *wholly* for determination by the courts of that state. As the Court of Appeals so aptly stated in answer to the question of "legal capacity" of the city:

> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. *However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.*" (Emphasis supplied). (396-397).

If the Commission has no such authority what could be accomplished by either presenting for consideration, or failing to present for consideration, the matter of

the relationship between sovereign state and municipal subdivision. If the Federal Power Commission has no authority to adjudicate the "legal capacity" of the City of Tacoma to initiate and act under the license once it is granted, then there is no need under Section 825 l(b) to urge the matter in application for re-hearing and failure to do was reasonable.

We call attention to the previsions of the city Charter. (Appendix page 33, 34). The powers that the city has by its Charter are the powers granted to it "by the Constitution and laws of the State and powers implied thereby".

Petitioner, at page 70, of its brief, calls attention to the fact that "property" of the State was brought before the Court of Appeals and quoted excerpts from the State's brief in that case. Counsel for respondents have examined this brief. None of the petitioner's present counsel represented the City of Tacoma, which was intervenor in that case, and hence they may be excused from propounding a meaning to "property" that was not present in that proceeding. The "property" being discussed before that court was the fish that swam and spawned in the Cowlitz River. The State claimed that the dams would destroy this "property". The court, page 397 of its opinion, indicated that this was the "property" referred to when it stated "they contend that the project will destroy the runs of Spring Chinook salmon, etc." The Court of Appeals made it quite clear that it was not passing upon the right or the legal capacity of the city to act but rather on the fact that the Federal Power Commission had a right

to grant a license and the city, *if it had capacity otherwise*, could proceed under that license.

CLAIM THAT LOWER COURT DECISION THWARTS PREFERENCE CLAUSE OF THE FEDERAL POWER ACT

Amicus curiae make considerable point of the fact that "the decision below would improperly frustrate the Cowlitz project and the Federal Power Commission's choice of licensee (Brief amicus curiae, page 14). They urge that the public preference provisions of the Act would be completely thwarted if the Federal Power Commission cannot grant the City of Tacoma a license; they infer that no one would ever be able to build a dam on the Cowlitz River except the United States. Both petitioner and amicus curiae infer in their brief that such a result would give the states a means of getting around the rule of the First Iowa case and other cases, and that states could buy up property in the area of a contemplated power project and defeat the Federal purpose. This is nonsense. The Federal Power Commission was in error if it assumed that the City of Tacoma had the power to acquire property of the state by eminent domain. There is however, legislative authority for Public Utility Districts of the state of Washington to acquire state property, and this authority is found under the provisions of R.C.W. 54.16.050 (Appendix page 32).

It is beneath the dignity of petitioner or amicus curiae to infer that the State of Washington has acquired this fish hatchery to thwart the Federal Power Commission. The State of Washington for many years prior to any proceedings in this matter has been operating a fish hatchery here and rather it

is an attempt by the Federal Power Commission and Tacoma to thwart the State of Washington in its governmental functions.

CONCLUSION

It is respectfully submitted that the decision of the Washington Court is correct and that it should be affirmed.

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APPENDIX

41 Stat. 1071, 16 U.S.C., Section 806:

"The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or if any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the

sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title."

41 Stat. 1074, 16 U.S.C., Section 814:

"When any licensee can not require by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.00. (June 10, 1920, c. 285, § 21, 41 Stat. 1074)

Laws of 1949, Chapter 9, Sec. 1; R.C.W. Section 75.20.010:

"All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be con-

structed thereon any dam of a height greater than twenty-five feet that may be located within the migration range of any anadromous fish as jointly determined by the director of fisheries and the director of game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: Provided, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the director of fisheries and director of game."

PUBLIC UTILITY DISTRICTS

R.C.W. 54.16.050

"Water rights. A district may take, condemn and purchase, purchase, and acquire any public and private property, franchises and property rights, including state, county, and school lands, and property and littoral and water rights, for any of the purposes aforesaid, and for railroads, tunnels, pipe lines, aquaducts, transmission lines, and all other facilities necessary or convenient, and, in connection with the construction, maintenance, or operation of any such utilities, may acquire by purchase or condemnation and purchase the right to divert, take, retain, and impound and use water from or in any lake or watercourse, public or private, navigable or non-navigable, or held, owned, or used by the state, or any subdivision thereof, or by any person for any public or private use, or any underflowing water within the state; and the

district may erect, within or without its limits, dams or other works across any river or watercourse, or across or at the outlet of any lake, up to and above high water mark; and, for the purpose of constructing or laying aqueducts or pipe lines. dams, or waterworks or other necessary structures in storing, retaining, and distributing water, or for any other purpose authorized hereunder, the district may occupy and use the beds and shores up to the high water mark of any such lake, river, or watercourse, and acquire by purchase or by condemnation and purchase, or otherwise, any water, water rights, easements, or privileges named herein or necessary for any of such purposes, and a district may acquire by purchase, or condemnation and purchase, or otherwise, any lands, property, or privileges necessary to protect the water supply of the district from pollution: *Provided*, That should private property be necessary for any of its purposes, or for storing water above high water mark, the district may condemn and purchase, or purchase and acquire such private property."

PERTINENT PROVISIONS CITY CHARTER CITY OF TACOMA

"Article I, Section 1.2. The city shall have all powers now or hereafter granted to like cities by the Constitution and laws of the state, and all powers implied thereby, and shall have and exercise all municipal rights, powers, functions, privileges and immunities, except as prohibited by law or by this charter. The city may acquire property within or without its corporate limits for any city purpose by purchase, condemnation, lease, gift, and devise, and may hold or dispose of such property as the interests of the city may require. No enumeration of particular powers by this charter shall be deemed to be exclusive.

"Article IV, Section 4.1. The city shall possess all the powers granted to cities by state law to construct, condemn and purchase, purchase, acquire, add to, maintain, and operate, either within or without its corporate limits, including but not by way of limitation, public utilities for supplying water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services, or any of them, to the municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above mentioned outside its corporate limits, to the extent permitted by state law."